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IN THE

Supreme Court of the United States

October Term, 1962.

No. 471.

MILDRED W. SMITH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	3
I. Facts	3
II. History of the Controversy	4
Reasons for Granting the Writ	9
I. The Decision of the Court of Appeals Below Is in Conflict With the Decisions of the Courts of Appeals for the Sixth and Eighth Circuits	9
II. This Is an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court	11
Conclusion	12
Appendix A—Statutes Involved	13
Appendix B—Opinion of USCA(3)	14
Appendix C—Judgment of USCA(3)	23
Appendix D—Order Denying Petition for Rehearing	24

TABLE OF CASES CITED.

	Page
Allinger v. United States, 275 F. 2d 421 (6th Cir. 1960)	5
Louise K. Aprill, 13 T. C. 707 (1949)	5
Bogardus v. Commissioner, 302 U. S. 34 (1937)	5
Bounds v. United States, 262 F. 2d 876 (4th Cir. 1958)	5
Canning v. United States, 10 AFTR 2d 5068 (N. D. Tex. 1962)	7
Commissioner v. Duberstein, 363 U. S. 278 (1960)	6, 7, 9, 11
Cowan v. United States, 6 AFTR 2d 5499 (N. D. Ga. 1960)	6
Estate of Cooper, 20 TCM 774 (1961)	7
Estate of Hellstrom, 24 T. C. 916 (1955)	9
Estate of Kuntz, 19 TCM 1379 (1960)	7
Estate of Marvin G. Pierpont, 35 T. C. 65 (1960)	7, 9
Frankel v. United States, 9 AFTR 2d 1372 (8th Cir. 1962)	8
Helvering v. Griffiths, 318 U. S. 371 (1943)	5
Kuntz v. Commissioner, 9 AFTR 2d 1155 (6th Cir. 1962)	8, 9, 10, 11
Florence S. Luntz, 29 T. C. 647 (1958)	5
Martin v. Commissioner, 10 AFTR 2d 5013 (3d Cir. 1962)	4
Olsen v. Commissioner, 9 AFTR 2d 1376 (8th Cir. 1962)	8, 9, 10, 11
Poyner v. Commissioner, 9 AFTR 2d 1151 (4th Cir. 1962)	8
Rice v. United States, 197 F. Supp. 223 (E. D. Wis. 1961)	7
Rodner v. United States, 149 F. Supp. 233 (S. D. N. Y. 1957)	5
Stanton v. United States, 363 U. S. 278 (1960)	6, 7
United States v. Kasynski, 284 F. 2d 143 (10th Cir. 1960)	8
United States v. Reed, 277 F. 2d 456 (6th Cir. 1960)	6
Vaughn v. United States, 10 AFTR 2d 5551 (S. D. Ga. 1962)	7

MISCELLANEOUS.

	Page
Internal Revenue Code of 1954:	
Sec. 61(a)(1)	2
Sec. 101(b)	2
Sec. 101(f)	2
Sec. 102(a)	2
I. T. 3329, 1939-2 Cum. Bull. 153 (1939)	5
I. T. 4027, 1950-2 Cum. Bull. 9 (1950)	5
Judicial Code, Section 1254(1), 28 U. S. C. § 1254(1)	2
O. D. 1017, 5 Cum. Bull. 101 (1921)	5
Rev. Rul. 58-613, 1958-2 Cum. Bull. 914 (1958)	6
Rev. Rul. 62-102, 1962 Int. Rev. Bull. No. 28, at 7	6
T. D. 2090 (Dec. 14, 1914)	5
Treas. Reg. 45, Art. 32	5

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Mildred W. Smith prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on June 28, 1962.

OPINIONS BELOW.

This case was tried before the Tax Court of the United States on October 24, 1960. The opinion of the Tax Court (13a),[1] which is not reported officially, is unofficially reported at 20 TCM 775. The opinion of the Court of Appeals, affirming the Tax Court, is printed in Appendix B, *infra,* page 14, and is reported unofficially at 10 AFTR 2d 5013.

1. This and similar references are to page numbers of the petitioner's Appendix filed with the Court of Appeals.

JURISDICTION.

The judgment of the Court of Appeals, printed in Appendix C, *infra*, page 23, was entered on June 28, 1962. A Petition for Rehearing, timely filed before July 27, 1962 pursuant to Order of the Court dated July 18, 1962, was denied on August 15, 1962. The Order denying the Petition for Rehearing is printed in Appendix D, *infra*, page 24.

Petitioner invokes the jurisdiction of this Court under Section 1254(1) of the Judicial Code, 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Where a corporation, upon the occasion of the death of an employee, voluntarily makes payments to his widow in recognition of his past services and with the purpose of tiding the widow over the period of adjustment caused by the loss of her late husband's income; and where the corporation was under no obligation whatever, express or implied, either to the former employee or his widow; did the Court of Appeals err in affirming the Tax Court's conclusion that the payments were compensation, and taxable income to the widow?

STATUTES INVOLVED.

The statutes involved are Sections 61(a)(1), 101(b), 101(f) and 102(a) of the Internal Revenue Code of 1954. They are printed in Appendix A, *infra*, page 13.

STATEMENT OF THE CASE.

I. Facts.

This case involves income taxes aggregating approximately $45,000, alleged to be owed by the petitioner with respect to the years 1955 and 1956.

Petitioner is the widow of Norman F. Wiss, who was formerly an officer of J. Wiss & Sons Co. ("Wiss & Sons"), a New Jersey manufacturer of shears, scissors and kindred products. Norman Wiss died on September 15, 1954, and on December 12, 1959 petitioner married Carleton Ford Smith (13a).

Norman Wiss had been a director and employee of Wiss & Sons for 35 years. At his death, he was employed as Vice-President and Treasurer, and was receiving $80,000 annually in salary and bonus (13a).

Following Mr. Wiss' death, Wiss & Sons desired to express its gratitude to him and make some provision for his widow. It had particularly in mind the need to tide her over the period of adjustment necessitated by the loss of much of the annual income to which she was accustomed (5a-9a, 15a-16a).

Accordingly, the Company's Board of Directors adopted two resolutions. The first was a memorial to Mr. Wiss. The second, after noting that the Board believed it "proper and fitting that recognition be made of the valuable and loyal services" rendered by Mr. Wiss to the Company, authorized the payment to the petitioner of specified amounts monthly until December 31, 1956 (14a-15a).[2]

Pursuant to the resolution, the petitioner received $38,841.37 in 1955 and $33,008.04 in 1956 (17a). The issue in this case is whether these payments were tax-free gifts to the petitioner, or were, as contended by the respondent,

2. The resolution also authorized payment to the petitioner of the remaining portion of the annual bonus for 1954 to which Mr. Wiss would have become entitled, had he lived.

the Commissioner of Internal Revenue, taxable to the petitioner as additional compensation to her late husband.

It is not disputed that Mr. Wiss was adequately compensated during his lifetime. The Company owed him nothing other than accrued compensation, which it paid to his estate. Nor does the Government contend that the payments were made under any pre-existing plan which would give rise to an implied obligation. Finally, the petitioner was never employed by the Company in any capacity; had never performed any services for it; and it was not expected that the Company would derive any benefit from her by reason of the payments (17a).

At the trial, the then President of the Company, who had also been an officer and director at the time the payments were authorized, testified that the Company intended to make a gift to the petitioner; and that the principal concern of the Company was the consequent adjustment to her standard of living resulting from the loss of some $80,000 of annual income (5a-9a). His testimony was uncontroverted.

Notwithstanding the foregoing, the Tax Court found that the intention of the Company was to compensate Mr. Wiss (22a-23a). The Court of Appeals affirmed, holding that the Tax Court's decision was not clearly erroneous.[3]

II. History of the Controversy.

The issue here is a simple one—the taxability of voluntary, gratuitous payments made by a corporation to the widow of a deceased employee.

Beginning in 1914, and for almost forty years thereafter, such payments were ruled by the Internal Revenue

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3. In a case argued the same day as the present case, the Court of Appeals affirmed another Tax Court decision that the payments there at issue were taxable. *Martin v. Commissioner*, 10 AFTR 2d. 5013 (3d Cir. 1962). We understand that the taxpayer in that case will also file a petition for certiorari.

Service to be tax-free to the widow.[4] The basis for these rulings, which specifically covered cases such as the one now at bar, was that the payments were made under no obligation, to one who had rendered no services. Comparable provisions were contained in the Regulations, which, beginning at least as early as 1921, provided:[5]

> "However, so-called pensions awarded by one to whom no services have been rendered are merely gifts or gratuities and are not taxable."

These regulations and rulings were in line with this Court's decision in *Bogardus v. Commissioner*,[6] where the important, if not controlling, fact was that the recipients of the gifts had performed no services for the payors.

In 1950, the Commissioner issued a ruling which reversed his prior long-standing position and reached the opposite conclusion that the payments are taxable. I. T. 4027, 1950-2 *Cum. Bull.* 9 (1950). This ruling might have been rejected by the courts under the doctrine that a continued administrative construction of a tax statute through repeated legislative reenactments has the force of law and may not be changed except by Congress. *Cf. Helvering v. Griffiths*, 318 U. S. 371 (1943). In fact, however, the Commissioner's new position was uniformly rejected on its merits. The courts, including the Courts of Appeals for the Fourth and Sixth Circuits, held the widow payments to be gifts despite the Commissioner's persistence in a large number of cases.[7]

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4. T. D. 2090 (Dec. 14, 1914); O. D. 1017, 5 *Cum. Bull.* 101 (1921); I. T. 3329, 1939-2 *Cum. Bull.* 153 (1939).

5. Treas. Reg. 45, Art. 32.

6. 302 U. S. 34 (1937).

7. *E.g., Bounds v. United States*, 262 F. 2d 876 (4th Cir. 1958); *Allinger v. United States*, 275 F. 2d 421 (6th Cir. 1960); *Rodner v. United States*, 149 F. Supp. 233 (S. D. N. Y. 1957); *Florence S. Luntz*, 29 T. C. 647 (1958); *Louise K. Aprill*, 13 T. C. 707 (1949). There are some 32 cases during this period holding the payments, in the absence of a plan, to be tax-free gifts. We know of no cases to the contrary.

Following enactment of the 1954 Code, the Commissioner conceded his error. In Revenue Ruling 58-613,[8] he ruled that widow payments to which the 1939 Code applies —*i.e.*, those made with respect to a decedent dying before August 16, 1954—are tax-free gifts unless it clearly appears they were dividends or disguised compensation.

Since Mr. Wiss died on September 15, 1954, the 1954 Code applies in this case. With regard to such cases, Revenue Ruling 58-613 stated that the Commissioner's position was under study. The 1954 Code made no change in the general substantive provisions regarding gifts. Consequently, the precedents in the widow cases under the 1939 Code had equal applicability to cases arising under the 1954 Code. However, the Commissioner apparently believed that an amendment in the 1954 Code regarding death benefits evidenced an attempt by Congress to deal specifically with widow payments. In subsequent cases, the Commissioner pressed this contention, but was defeated.[9]

The controversy thus appeared to be at the point of final resolution, in accordance with the cases, regulations and rulings which had previously been in effect for some forty years.

On June 13, 1960, this Court decided *Commissioner v. Duberstein*, 363 U. S. 278 (1960). As the Court will recall, *Duberstein* (and its companion case, *Stanton v. United States*) involved payments respecting past services performed by the recipient for the payor. The Court held that the determination whether the payments were consideration for the past services depended upon the intent of the payor, and this in turn rested primarily in the hands of the trial court. The decision was expressly said to be declaratory of existing law.[10]

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8. 1958-2 *Cum. Bull.* 914 (1958).

9. *E.g., United States v. Reed*, 277 F. 2d 456 (6th Cir. 1960); *Cowan v. United States*, 6 AFTR 2d 5499 (N. D. Ga. 1960). The contention has since been abandoned. Rev. Rul. 62-102, 1962 INT. REV. BULL. No. 28, at 7.

10. 363 U. S. at 284-6.

Neither *Duberstein* nor *Stanton* contained the unique characteristic of the widow cases—which has distinguished them from the beginning—that the payments are voluntarily made to a third party who has done nothing for the payor. Consequently, this Court has not yet considered the legal consequences of this particular factual pattern.

Nonetheless, on October 19, 1960 the Tax Court, in *Estate of Marvin G. Pierpont*,[11] changed its mind and held that the payments there involved—which were made under the same circumstances as the present case, and all other widow payment cases—were taxable as additional compensation to the deceased employee. The Tax Court said its decision was made "in the light of" the *Duberstein* case.[12]

Following the *Pierpont* case, the Tax Court has uniformly held the widow payments taxable.[13] The District Courts, however, have generally adhered to the precedents established prior to *Duberstein*.[14] For example, in *Rice v. United States*, the District Court for the Eastern District of Wisconsin said:[15]

> "The recent decision of *Estate of Marvin G. Pierpont v. Commissioner of Internal Revenue*, 35 T. C. 65 (1960), and cases following its holding show a change in the tax court's interpretation of the term 'gift' as used in the Internal Revenue Code. It is the opinion of this court that *Commissioner of Internal Revenue v. Duberstein, supra*, relied on in the *Pierpont* case, reaffirms previous principles rather than proposes new rules governing the determination whether corporate transfers constituted gifts for the purposes of the Internal Revenue Code. Accordingly, where, as in the

11. 35 T. C. 65 (1960).

12. Id. at 67.

13. *E.g., Estate of Cooper*, 20 TCM 774 (1961); *Estate of Kuntz*, 19 TCM 1379 (1960).

14. *E.g., Vaughn v. United States*, 10 AFTR 2d 5551 (S. D. Ga. 1962); *Canning v. United States*, 10 AFTR 2d 5068 (N. D. Tex. 1962).

15. 197 F. Supp. 223, 226 (E. D. Wis. 1961).

instant case, there has been a showing of donative intent and where an objective inquiry reveals the substance of the transaction as consistent with the transferor's intention, the payment in question qualifies as a gift."

With the exception of the Court of Appeals below, the appellate courts have not sustained the Tax Court's view that *Duberstein* requires a change in the law in these cases.

The Court of Appeals for the Sixth and Eighth Circuits have reversed Tax Court findings of taxability, holding them to be clearly erroneous. *Kuntz v. Commissioner*, 9 AFTR 2d 1155 (6th Cir. 1962); *Olsen v. Commissioner*, 9 AFTR 2d 1376 (8th Cir. 1962). In *Frankel v. United States*, 9 AFTR 2d 1372 (8th Cir. 1962), the Court of Appeals for the Sixth Circuit affirmed a District Court finding that the payments were tax-free gifts. Petitions for certiorari have been filed by the Solicitor General in all three cases.

In a fourth case, the Court of Appeals for the Tenth Circuit affirmed a District Court holding that the payments were gifts. *United States v. Kasynski*, 284 F. 2d 143 (10th Cir. 1960). No petition for certiorari was filed by the Solicitor General in that case. The Tax Court's decision in *Pierpont* was also appealed, and the Court of Appeals for the Fourth Circuit remanded the case for further findings. *Poyner v. Commissioner*, 9 AFTR 2d 1151 (4th Cir. 1962).

In summary, it may fairly be said that the tax treatment of widow payments—which was once clear—is now chaotic. Such payments are held to be taxable by the Tax Court, but are generally held to be gifts by the District Courts. Two Courts of Appeals (the Sixth and Eighth Circuits) have held them to be gifts, and one other (the Tenth) has indicated agreement with this view. On the other hand, the Court of Appeals below (the Third Circuit) has affirmed a Tax Court holding of taxability. Finally, the position of the Fourth Circuit is in doubt.

REASONS FOR GRANTING THE WRIT.

I. The Decision of the Court of Appeals Below Is in Conflict With the Decisions of the Courts of Appeals for the Sixth and Eighth Circuits.

On the merits, the issue here is whether the payments by Wiss & Sons to the petitioner were gifts or compensation. As this Court has most recently reiterated in *Duberstein*, the crux of the matter is the intent of the payor—in this case, an inference to be drawn from undisputed facts. The Tax Court here found an intent to compensate, and the Court of Appeals affirmed.

This decision by the Court of Appeals below is irreconcilably in conflict with the decision of the Sixth Circuit in *Kuntz v. Commissioner, supra*, and the decision of the Eighth Circuit in *Olsen v. Commissioner, supra*. As stated heretofore, petitions for certiorari have been filed by the Solicitor General in those cases, stating as a ground therefor the conflict with the present case.

Both the *Kuntz* and *Olsen* cases involve factual situations which, as a substantive matter, are indistinguishable from this case, or, indeed—absent a plan of giving—from any other widow payment case. These basic facts, which until the *Pierpont* decision were the accepted guideposts for legal advice in this area, were categorized by the Tax Court in 1955 as follows: [16]

> "We think the controlling facts here which establish the payment in question as a gift are that the payment was made to petitioner and not to her husband's estate; that there was no obligation on the part of the corporation to pay any additional compensation to petitioner's husband; it derived no benefit from the

16. *Estate of Hellstrom*, 24 T. C. 916, 920 (1955).

payment; petitioner performed no services for the corporation and, as heretofore noted, those of her husband had been fully compensated for. We think the principal motive of the corporation in making the payment was its desire to do an act of kindness for petitioner. The payment, therefore, was a gift to her and not taxable income."

On these facts—the payments being made voluntarily to a third party who had rendered no services—the Courts of Appeals for the Sixth and Eighth Circuits held that the "*only reasonable inference*" to be drawn is that the Company intended to make a gift.[17] Thus, in the view of those Courts, this is a question which cannot be submitted to the trier of fact. It is, to use a simple analogy, like negligence as a matter of law.

The Court of Appeals below, however, concluded on precisely the same basic facts that the Tax Court was free to draw the opposite inference and find an intention to compensate the widow's deceased husband.

In the present posture, therefore, the triers of fact in the Sixth and Eighth Circuits will follow the legal standard announced by the Courts of Appeals in those jurisdictions. We think that standard is correct, and that these payments are gifts as a matter of law. In the Third Circuit, however, the trial courts will be forced to wrestle with meaningless side issues—for example, minor variations in the wording of the corporate resolution; or the varying "need" of the widows by reference to their outside income.

More important, such peripheral facts have little, if any, importance in the usual case. This is illustrated by the uniform treatment of these cases in the Tax Court where, since *Pierpont*, every taxpayer has lost regardless of the facts. Thus taxpayers in the Third Circuit who must

17. *Kuntz v. Commissioner, supra*, at 1158; *Olsen v. Commissioner, supra*, at 1379.

go to the Tax Court are assured of losing, whereas taxpayers in the Sixth and Eighth Circuits are assured of winning. This is a senseless conflict which this Court should resolve.

II. This Is an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

As stated earlier, petitions for certiorari have been filed by the Solicitor General in the *Kuntz* and *Olsen* cases. In his petitions in those cases, the Solicitor General pointed out the importance of this question in terms of cases and dollars involved. We know from our own experience the extent to which the practice of making gifts to widows has become widespread, and almost commonplace, in American industry. The figures mentioned by the Solicitor General substantiate this and, we submit, justify review of the matter by this Court.

Finally, this question was *not* disposed of in the *Duberstein* case. That case involved payments to one who had rendered services for the payor. The issue, then, was whether the payments were consideration for the past services.

In the widow situation, however, the payments were made under no obligation to one who had rendered no services. It is as though the corporation had made a gift to a private clinic[18] which had been a favorite charity of the decedent during his lifetime. We believe—and for some 40 years the Commissioner agreed—that in this circumstance the payments are gifts as a matter of law.

This proposition has never been before this Court, and we respectfully urge the Court to consider it.

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18. A private clinic would not ordinarily be exempt from income tax.

CONCLUSION.

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Internal Revenue Code of 1954.

§ 61. Gross Income Defined.

(a) General Definition.

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

§ 101. Certain Death Benefits.

(b) Employees' Death Benefits.

(1) General rule.—Gross income does not include amounts received (whether in a single sum or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee.

(2) Special rules for paragraph (1)—

(A) $5,000 limitation.—The aggregate amounts excludable under paragraph (1) with respect to the death of any employee shall not exceed $5,000.

* * *

(f) Effective Date of Section.

This section shall apply only to amounts received by reason of the death of an insured or an employee occurring after the date of enactment of this title. Section 22(b)(1) of the Internal Revenue Code of 1939 shall apply to amounts received by reason of the death of an insured or an employee occurring on or before such date.

§ 102. Gifts and Inheritances.

(a) General Rule.

Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,815

MILDRED W. SMITH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

Argued March 5, 1962

Before STALEY, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 28, 1962)

By STALEY, *Circuit Judge.*

The question on this appeal is whether the Tax Court's finding that certain payments made by a corporation to the widow of a deceased officer did not constitute a gift is clearly erroneous.

Mildred W. Smith, petitioner on this appeal, is the remarried widow of Norman F. Wiss, who died on September 15, 1954. Prior to his death, deceased had been an em-

ployee of J. Wiss & Sons Co. ("corporation") for thirty-five years. Pursuant to a resolution passed by its board of directors, the corporation paid petitioner $38,841.37 in 1955 and $33,008.04 in 1956.[1] Petitioner failed to report these payments as income.

The Commissioner concluded that the payments constituted ordinary income and assessed a deficiency against petitioner which the Tax Court upheld.[2] The Tax Court found as a fact that the "dominant motive behind these payments was to give tangible recognition (by way of additional compensation) to the highly valuable services rendered by the decedent over a long period of time," and that the payments were not made as a gift to petitioner.

On appeal, petitioner contends that the Tax Court erroneously concluded that the Supreme Court in Commissioner v. Duberstein, 363 U. S. 278 (1960), changed the law regarding the criteria relevant in resolving the factual inquiry as to whether the payments constituted a gift, and that when the facts of this case are considered in light of the criteria before *Duberstein*, the payments clearly were gifts.[3] The Commissioner, on the other hand, contends that under *Duberstein* the question is purely factual, and the Tax Court's findings here must be affirmed unless they are clearly erroneous.

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1. In the year 1954, the corporation also paid petitioner a $5,000 death benefit and $16,000 in periodic payments. These payments are not in dispute here.

2. The Tax Court's finding and opinion are not officially reported.

3. In this regard, petitioner lists the following factors which she contends were decisive in past Tax Court decisions: (1) payments were made to the widow rather than to the husband's estate; (2) transferee never performed any service for the corporation; (3) the corporation was under no obligation to deceased or transferee to make the payments; (4) deceased was fully and adequately compensated for all services he performed to the corporation; (5) the corporation derived no benefits from the payments; (6) the corporation did not characterize or treat the payments as compensation.

Because of the importance that the parties attach to Commissioner v. Duberstein, supra, we think it advisable to review in some detail the facts and holding of that decision. *Duberstein* involved two separate appeals.[4] In one, the taxpayer had received an automobile from a business associate which he failed to report as income, deeming it to be a gift. The other appeal involved payments made by an employer to an employee who had resigned his position. The Supreme Court concluded that the Tax Court's finding that the transfer of the automobile constituted a gift was not clearly erroneous, and remanded the other appeal to the trial court for more explicit findings of fact as to whether the payments constituted a gift. The Court refused the Commissioner's invitation to spell out a new test for resolving the question of gift versus income. What ultimately controls, it said, is the intention of the transferor. In making this determination, the proper criteria are those that logically disclose the reason for the transferor's action—"the dominant reason that explains his action in making the transfer." 363 U. S. at page 286. The mere absence of a moral or legal obligation to make the payments does not establish a gift, and a voluntary transfer of property without any consideration or compensation, therefore, although it constitutes a common law gift, is not necessarily a gift within the tax statutes. Reviewing prior decisions, the Court, at 363 U. S. 285, said: "A gift in the statutory sense, on the other hand, proceeds primarily from a 'detached and disinterested generosity' * * * out of affection, respect, admiration, charity or like impulses." If the payment proceeds, however, primarily from a moral duty or legal obligation, or finds its genesis in an anticipated benefit that is economic in nature, it is not a gift. But the presence or absence of economic benefit is irrelevant where the transfer is made in return for services rendered.

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4. No. 376, Commissioner v. Duberstein; No. 546, Stanton v. United States.

The Commissioner contended in *Duberstein* that payments made by an employer to an employee are by and large taxable as income, and that the concept of a gift is inconsistent with the payments being deductible as business expenses, and that since a gift involves personal elements, a business corporation cannot make a gift of its assets. The Court refused to adopt these so-called "principles" or "presumptions," saying:

> "Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, confirm us in our conclusion that the primary weight in this area must be given to the conclusions of the trier of facts." 363 U. S. at 289.

United States v. Kaiser, 363 U. S. 299 (1960), was decided the same day as *Duberstein*. In *Kaiser*, the jury determined that strike benefits by way of room rent and food vouchers, rendered by a labor union to striking members constituted a gift. The trial judge, however, entered judgment n.o.v. in favor of the government, concluding that the assistance constituted income as a matter of law. In concluding that the jury's finding should not have been put aside, the Court reviewed the facts and unmistakably delineated the scope of appellate review:

> "• • • the jury could have concluded that assistance, rendered as it was to a class of persons in the community in economic need, proceeded primarily from generosity or charity, rather than from the incentive of anticipated economic benefit. We can hardly say that, as a matter of law, the fact that these trans-

fers were made to one having a sympathetic interest with the giver prevents them from being a gift. * * *

"We need not stop to speculate as to what conclusion we would have drawn had we sat in the jury box rather than those who did. *The question is one of the allocation of power to decide the question; and once we say that such conclusions could with reason be reached on the evidence, * * * our reviewing authority is exhausted.* * *.*" (Emphasis supplied.) 363 U. S. at 304-305.

In summary, determination of whether a transfer constitutes a gift is a factual one, which must be made on a case-by-case approach, resting with the trier of fact which is to make it in light of all the relevant facts and circumstances. Thus, under *Duberstein* and *Kaiser*, such a determination must be affirmed unless it is clearly erroneous.

A review of the record convinces us that the Tax Court did not rely on irrelevant facts and circumstances, that its finding is a permissible one and is not clearly erroneous. In 1948 and again in 1953, the board of directors considered the adoption of a pension plan for its employees that was to be supplemented by payments to the officers' widows. One of the reasons given for not adopting the program of supplemental payments was that the board thought it inappropriate to make arrangements for officers that the corporation could not afford for other employees. Between 1951 and decedent's death, the corporation made death payments to the widows of four employees. The payments, as here, were made monthly for varying periods, although in amounts substantially less than petitioner received. The four deceased employees were, however, salesmen, not executives, but received salaries in excess of $10,000. The deceased, on the other hand, received an annual salary of $80,000 at the time of death and had been associated with the corporation as officer, director or employee for over thirty-five years. Although the widows

were not precluded from disclosing the payments, the corporation sought to receive no publicity for them.

When Norman F. Wiss died, the corporation had fifty-seven common stockholders. Decedent and petitioner held approximately 7.7% of the stock, while most of the remaining major stockholders were related to decedent. Large blocks of stock were held by the estate of decedent's father, and by his sister, brother, nephew and cousin. Four board members attended the September 23, 1954, meeting that authorized the payments in question. One was decedent's brother, two were his cousins, while the fourth was a nephew.

The first resolution adopted by the board that day read as follows:

> "Resolved, that the following memorial be inscribed in the minutes of the directors of the company, and that a copy thereof be sent to Mildred S. Wiss, the surviving widow of Mr. Norman F. Wiss:
>
> > "The passing of a relative and associate and friend is always difficult to accept; and it is particularly so in the case of Norman F. Wiss with whom we were in close association for many years.
> >
> > "Norman had been a director of the company for 35 years, and for 23 years he was vice president and treasurer, all of which offices he filled with distinction and with great benefit to the company.
> >
> > "The sound financial condition of the company and its excellent reputation throughout the world are attributable in a large measure to the tireless energies, sound business judgment, high ideals and farsightedness of Norman. We owe a great deal to him, and we take this opportunity of expressing our gratitude for his valuable and loyal services and our deepest regret over his sudden and early death."

The second provides that

"Whereas, Norman F. Wiss who was a director, vice president and treasurer of this company for many years died on September 15th. 1954 leaving his widow, Mildred S. Wiss, surviving; and

"Whereas, the directors of the company feel that it is proper and fitting that recognition be made of the valuable and loyal services which he rendered to the company.

"Now, therefore, be it Resolved that the company make the following payments to the said Mildred S. Wiss:

"At the rate of $4583.33 per month (that being the salary of Norman F. Wiss at the time of his death, excluding bonuses) from September 15th, 1954 to December 31st, 1954.

"7/24ths of the bonus which would have been paid to Mr. Wiss for the year 1954 (the 7/24ths being based on the period from September 15th, 1954 to December 31st, 1954; the remaining 17/24ths of the said bonus to be paid to the executors of the estate of the said Norman F. Wiss on account of compensation for services from January 1st, 1954 to the date of his death which occurred on September 15th, 1954).

"2750.67 per month for the two (2) year period beginning January 1st, 1955 and ending December 31st, 1956. The said payments to be made on the first day of each month beginning January 1st, 1955.

"$5,000.00; payment as a death benefit under the Internal Revenue Code."

The bonus plan referred to was instituted in 1950. After paying a bonus that year, the corporation directed its

treasurer to set aside on its books the sum of $64,000 as additional compensation from which decedent was to receive $20,000 if certain conditions prevailed. The bonus plan was continued, and after an audit it was determined that the conditions required for payment of the additional amount existed for the year 1954. Decedent's estate was paid 17/24 of the $20,000 which decedent would have been entitled to had he remained with the corporation until December 31, 1954, and the petitioner received the other 7/24. The petitioner was paid the following amounts pursuant to the resolution:

	1954	*1955*	*1956*
Death benefits	$ 5,000		
7/24 of bonus		$ 5,833.33	
Periodic payments	16,000	33,008.04	$33,008.04

The payments were deducted by the corporation as business expenses. The president of the corporation who was also a member of the board testified that the payments were based in part on decedent's long and valuable service to the corporation as well as the amount of his annual income, and that the payments would not have been made had there not been an employer-employee relationship between the corporation and the decedent.

There was also some testimony that the transfer was intended as a gift, and that it was made in order to help petitioner financially during the period of transition following her husband's death. The president also testified, however, that the second resolution was adopted authorizing payment without the petitioner's needs being discussed, and no concern was shown for income that she had from other sources. The petitioner reported as income in the form of dividends, interest and gains from the sale or exchange of property $35,376.90 in the year 1955 and $37,089.67 for 1956. Petitioner was never employed by the corporation, and there was evidence in the record that decedent's salary at the time of death was a fair and reasonable one. But these

and other facts which the petitioner presses need not be reviewed in detail, for what we have outlined above clearly indicates that the conclusion of the Tax Court was a permissible one.

The petitioner cites a number of decisions in support of her position. Several of them, Olsen v. Commissioner, F. 2d (C. A. 8, 1962); United States v. Frankel, F. 2d (C. A. 8, 1962); Kuntz v. Commissioner, F. 2d (C. A. 6, 1962); Poyner v. Commissioner, F. 2d (C. A. 4, 1962); and United States v. Kasynski, 284 F. 2d 143 (C. A. 10, 1960), were handed down after *Duberstein*. A review of these decisions does little more than point out the nature of our inquiry, and their inapplicability is clear, for "the question here remians basically one of fact, for determination on a case-by-case basis." Duberstein v. Commissioner, 363 U. S. at 290. We cannot exceed the narrow function assigned to us, regardless of what others have done.

The decision of the Tax Court will be affirmed.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,815

MILDRED W. SMITH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

June 28, 1962.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,815

MILDRED W. SMITH,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER SUR PETITION FOR REHEARING.

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT:

STALEY,
Circuit Judge.

Dated:
August 15, 1962.

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FILED
OCT 31 1962
JOHN F. DAVIS, CLERK

No. 471

In the Supreme Court of the United States

October Term, 1962

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 471

MILDRED W. SMITH, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 13a–23a [1]) is not officially reported. The opinion of the court of appeals (Pet. 14–22) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1962 (Pet. 23). A timely petition for rehearing was denied on August 15, 1962 (Pet. 24). The petition for a writ of certiorari was filed on September 28, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the appendix to the taxpayer's brief in the court of appeals.

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QUESTION PRESENTED

Upon the death of an officer of a corporation, the board of directors authorized the payment, out of corporate assets, of $92,849 to his widow. The question is whether the payment so authorized was a "gift" excludible from the widow's gross income under § 102(a) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 102. GIFTS AND INHERITANCES.

(a) *General Rule.*—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

* * * * *

STATEMENT

1. Norman F. Wiss died on September 15, 1954. He was then the vice-president and treasurer and a director of, and had been associated for thirty-five years with, J. Wiss & Sons Co. Mr. Wiss and his wife together owned 7.7% of the stock of the corporation, and the balance was owned primarily by other descendants of his grandfather, the company's founder. At the date of his death, Mr. Wiss was the highest paid officer of the corporation, receiving salary and bonuses totalling $80,000, the earned portion of which was subsequently paid to his estate and is not in issue. (R. 10a, 13a, 17a–18a.)

On September 23, 1954, the board of directors of the corporation (a brother, two cousins, and a nephew

of the decedent) adopted the following resolutions (R. 14a–15a):

> RESOLVED, that the following memorial be inscribed in the minutes of the directors of the company, and that a copy thereof be sent to Mildred S. Wiss, the surviving widow of Mr. Norman F. Wiss:
>
> The passing of a relative and associate and friend is always difficult to accept; and it is particularly so in the case of Norman F. Wiss with whom we were in close association for many years.
>
> Norman had been a director of the company for 35 years, and for 23 years he was vice president and treasurer, all of which offices he filled with distinction and with great benefit to the company.
>
> The sound financial condition of the company and its excellent reputation throughout the world are attributable in a large measure to the tireless energies, sound business judgment, high ideals and farsightedness of Norman. We owe a great deal to him, and we take this opportunity of expressing our gratitude for his valuable and loyal services and our deepest regret over his sudden and early death.
>
> * * * * *
>
> Whereas, Norman F. Wiss who was a director, vice president and treasurer of this company for many years died on September 15th, 1954 leaving his widow, Mildred S. Wiss, surviving; and
>
> Whereas, the directors of the company feel that it is proper and fitting that recognition be

made of the valuable and loyal services which he rendered to the company.

Now, therefore, be it Resolved that the company make the following payments to the said Mildred S. Wiss:

At the rate of $4583.33 per month (that being the salary of Norman F. Wiss at the time of his death, excluding bonuses) from September 15th, 1954 to December 31st, 1954.

7/24ths of the bonus which would have been paid to Mr. Wiss for the year 1954 (the 7/24ths being based on the period from September 15th, 1954 to December 31st, 1954; the remaining 17/24ths of the said bonus to be paid to the executors of the estate of the said Norman F. Wiss on account of compensation for services from January 1st, 1954 to the date of his death which occurred on September 15th, 1954).

$2750.67 per month for the two (2) year period beginning January 1st, 1955 and ending December 31st, 1956. The said payments to be made on the first day of each month beginning January 1st, 1955.

$5,000.00; payment as a death benefit under the Internal Revenue Code.

Pursuant to the resolution, the corporation made payments to Mrs. Wiss totalling $92,849—$21,000 in 1954, $38,841 in 1955, and $33,008 in 1956. The corporation deducted the payments on its income tax returns as business expenses. Mrs. Wiss treated them as "gifts" excludible from income under § 102(a) of the 1954 Code. The Commissioner held that the payments were not gifts and determined deficiencies for

1955 and 1956 accordingly.[2] In due course, Mrs. Wiss (who later became Mrs. Smith) petitioned the Tax Court for a redetermination of the deficiencies. (R. 13a, 17a, 21a–22a.)

2. On four occasions prior to Mr. Wiss' death, the corporation had made relatively small payments (varying from $850 to $1700, though in each case the employee had earned more than $10,000 a year) to the widows of non-executive employees; on other occasions, however, it had made no payments (R. 19a–20a). It had never previously made any payments to a widow or survivor of a deceased officer (R. 19a). Approximately five months after Mr. Wiss' death, the president of the corporation (Mr. Wiss' brother) died leaving no widow, and the board of directors authorized a $5,000 payment to his surviving children (R. 20a). A year later, the corporation adopted a pension and retirement plan which provided specifically for death benefits. After adoption of the plan, the board on two occasions authorized payments to widows in addition to those payable under the plan ($5,000 to the widow of an executive vice-president; $1200 to the widow of a salesman) (R. 20a–21a).

The only material testimony offered at the trial was that of Richard R. Wiss, the decedent's nephew, an officer (later president) of the corporation, and one of the directors who had voted for the resolution. Asked

[2] No deficiency was determined for 1954, so that year is not involved. Of the $21,000 received in 1954, $5,000 was admittedly excludible as an employee death benefit under § 101(b), but it does not appear why no deficiency was asserted as to the remaining $16,000 paid in that year.

what had occurred at the directors' meeting, he testified (R. 5a–6a):

> A. There was a general resolution adopted direct[ed] to Mrs. Mildred Wiss and made a part of the minutes in appreciation of Norman Wiss' many excellent years of past service, and after a considerable discussion there was a gift voted to Mrs. Mildred Wiss of approximately $80,000, spread over the next two years.
>
> Q. What was the motive of the Board in making this payment to Mrs. Wiss?
>
> A. The motive?
>
> Q. Yes.
>
> A. Primarily one of paying to the widow of a man who had been associated with the company in a primary capacity for many years, who had a substantial income to, say, give her an adjustment immediately following his death to a lowered financial basis of operation.
>
> Q. Did you consider at the time that Norman Wiss had been fully compensated for his services he had given the company?
>
> A. Very adequately, yes.
>
> * * * * *
>
> Q. Did you expect at that time, if you died, the company would make some payment to your widow?
>
> A. No, I didn't.

On cross-examination by government counsel, the witness testified (R. 6a–7a):

> A. On the same basis that we voted gifts to widows of other employees, we would have voted a gift as a transition to Mrs. Norman Wiss. I don't believe—I believe that the gift was proportionate to the fact that Norman Wiss

was considered an important employee to the company, consequently his salary was in the range that it was.

Q. So that the only reason you voted Mrs. Wiss a payment of this size was because of the value?

A. No, because of the size of his salary and a transition amount to tide her over as a widow, losing a substantial part of the income to which she had been accustomed.

Q. Now, Mr. Wiss, I ask you if you would have paid, as a director, from the funds of Wiss and Sons an amount, a payment of this type to Mrs. Norman Wiss if Mr. Norman Wiss had not been an employee of Wiss and Sons.

A. We certainly wouldn't if he hadn't been an employee.

Asked whether the amount of the payments was based on Mr. Wiss' salary, the witness replied (R. 7a):

A. It was the fact that his sizable income was such that without it, Mrs. Norman Wiss would have had an extremely hard time, as far as a transition, a transitory change of status of living.

He explained that no specific inquiry was made into Mrs. Wiss' income from other sources and that the action was based rather on an assumption that any widow suffering such a substantial reduction of income would have to make an adjustment in her mode of living (R. 8a). This colloquy followed (R. 8a–9a):

Q. Now, Mr. Wiss, keeping in mind your duties as a director, would you say that this payment was, as you stated in the minutes, in recognition of the services of Norman Wiss to the company?

A. I don't believe exactly that, no.

Q. Then, it was not in recognition of the services?

A. It was certainly in recognition of his position as an employee of the company, or else as directors we wouldn't have been making a gift to an outsider.

Q. In effect, you would not make a gift to an outsider?

A. We certainly wouldn't.

Q. You state this wasn't in recognition of his services?

A. It would be made in recognition of his salaried position as an officer of the company, yes.

Q. Isn't that saying the same thing, Mr. Wiss?

A. I can say as a non-employee, if he had not been an employee, and you rule out the element of service, entirely, we would not, I am sure, have voted to make a gift to Mrs. Norman Wiss. As an employee, his services were compensated by his salary at the time, and I can only repeat again that the gift was made in a transitory situation for a continuation of the salary that Mrs. Norman Wiss had been living on.

On re-direct examination, the witness was asked whether he had considered the several prior occasions on which widow-payments had been made (noted above) to be a "binding precedent on the Board." He replied (R. 9a):

A. There was no precedent upon the Board, no binding obligation on the part of the Board. There was no established practice. Each situation was handled on the basis of its own merits, and this is the situation that I per-

> sonally objected to when I became President of the company and had requested that a pension plan be put into effect, so that there could be a more equitable handling of any payments given to widows, rather than individual need in one case and no consideration in others where they may have been needed.

3. The Tax Court held that the payments were not gifts (R. 13a–23a). Although acknowledging that the directors "did have in mind to some extent the widow's diminished income," the court said (R. 22a):

> * * * we find it difficult to believe on the record as a whole that the payments to petitioner were based upon her needs, that they proceeded from a "detached and disinterested generosity," or that they were made "out of affection, respect, admiration, charity, or like impulses." Cf. *Commissioner* v. *Duberstein, supra*, 363 U.S. at p. 285. To the contrary, we conclude from the evidence as a whole that the dominant motive behind these payments was to give tangible recognition (by the way of additional compensation) to the highly valuable services rendered by the decedent over a long period of time.

The court of appeals held that the Tax Court's finding was not clearly erroneous and affirmed the judgment (Pet. 14–22).

ARGUMENT

As stated in the government's petitions for certiorari in *Commissioner* v. *Kuntz* and *Commissioner* v. *Olsen*, Nos. 394 and 395, this Term, we agree with the petitioners that the decision in this case, although in our view correct, is in direct conflict with the decisions of the Sixth and Eighth Circuits in those cases. We

also agree, as there stated, that the question is important. Accordingly, we join the petitioners in urging that the petition for certiorari be granted.

Respectfully submitted.

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OCTOBER 1962.